Supreme Court, U. S.
FILED
JUN 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975
No. 74-1656

JOHN C. MOE, et al.,

Appellants,

v.

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al.,

Appellees,

OCTOBER TERM, 1975
No. 75-50

v.

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al.,

Appellants,

v.

JOHN C. MOE, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

REPLY BRIEF FOR THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF POSITION OF THE STATE OF MONTANA

SLADE GORTON
Attorney General of the State of Washington
TIMOTHY R. MALONE
Assistant Attorney General

Temple of Justice
Olympia, WA 98504
Telephone (206) 753-6245

STATE PRINTING PLANT OLYMPIA, WASHINGTON

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975
No. 74-1656

JOHN C. MOE, et al.,

Appellants,

v.

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al.,

Appellees,

OCTOBER TERM, 1975
No. 75-50

v.

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al.,

Appellants,

v.

JOHN C. MOE, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

REPLY BRIEF FOR THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF POSITION OF THE STATE OF MONTANA

SLADE GORTON
Attorney General of the State of Washington
TIMOTHY R. MALONE
Assistant Attorney General

Temple of Justice
Olympia, WA 98504
Telephone (206) 753-6245

INDEX

Page

I. *McCLANAHAN v. ARIZONA STATE TAX COMM'N* DOES NOT CONTROL THE MERITS OF THESE CONSOLIDATED APPEALS. THE MERITS ARE CONTROLLED BY THE PRINCIPLES ESTABLISHED IN *OKLAHOMA TAX COMMISSION v. U.S.* ..1

A. *McClanahan* is not controlling 2

B. *Oklahoma Tax Comm'n v. United States*, applied in the light of the principles of equal protection embodied in the Fifth Amendment, controls the merits of these appeals. 7

II. THE COURT NEED NOT REACH THE QUESTION OF WHETHER JURISDICTION EXISTS WITH RESPECT TO THE INDIVIDUAL TRIBAL MEMBERS PURSUANT TO 28 USC 1343(3) and 42 USC 1983 ...11

TABLE OF CASES

Board of County Comm'rs v. Seber, 318 U.S. 705 (1943)...10

Draper v. United States, 164 U.S. 240 (1896) 5

Goudy v. Meath, 203 U.S. 146 (1906) 5

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) ...12

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 1, 2, 3, 6, 7, 9

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 10

Morton v. Mancari, 417 U.S. 535 (1974) 8, 10

New York v. United States, 326 U.S. 572 (1946) 10

Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943) 1, 3, 6, 7, 9

Satiacum v. Kinnear, (CA 9th Cir.) No. 74-1121 13

Williams v. Lee, 358 U.S. 217 (1959) 6

FEDERAL CONSTITUTION, TREATIES AND STATUTES

	Page
Fifth Amendment—U.S. Constitution	7, 9, 11
Navajo Treaty of June 1, 1868, 15 Stat. 667, 668	3
Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, 976	3
Arizona Enabling Act of June 20, 1910, 36 Stat. 557, 568, 569-70	4
General Allotment Act of February 8, 1887, 24 Stat. 388	5
Indian Reorganization Act of June 18, 1934, 48 Stat. 984	3
Montana Enabling Act of February 22, 1889, 25 Stat. 676, 677	4, 5
Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. 349	5
Act of August 15, 1953, 67 Stat. 588 (Public Law 280)	6
28 U.S.C. 1341	11, 12
28 U.S.C. 1343(3)	11, 12
28 U.S.C. 1362	11, 12
42 U.S.C. 1983	11, 12, 13

OTHER AUTHORITIES

Department of Commerce, Federal and State Indian Reservations and Indian Trust Areas, pp. 63-65 (G.P.O. 1974) 2

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975
No. 74-1656

JOHN C. MOE, et al.,

Appellants,

v.

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al.,

Appellees,

OCTOBER TERM, 1975
No. 75-50

v.

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al.,

Appellants,

v.

JOHN C. MOE, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

ARGUMENT IN REPLY TO APPELLEES (AND CROSS-APPELLANTS)

I

McCLANAHAN v. ARIZONA STATE TAX COMM'N DOES NOT CONTROL THE MERITS OF THESE CONSOLIDATED APPEALS. THE MERITS ARE CONTROLLED BY THE PRINCIPLES ESTABLISHED IN *OKLAHOMA TAX COMM'N v. U.S.*

A. *McClanahan is not controlling.*

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) involved the applicability of a state tax law to a reservation Indian, as does the case at bar; but the similarity ends there. *McClanahan* involved a much different type of reservation and a much different type of tax.[1]

McClanahan reflected on the legal level the facts existing on the geographical level; not only is the Navajo reservation legally isolated, but it is isolated geographically as well. It encompasses about 14 million acres, of which at most only a minuscule portion is in private ownership.[2] As would be expected, the non-Indian population is likewise minuscule, if existent at all.[3]

At least one reason for this factual pattern is touched upon by Judge Smith in his dissent in the cigarette tax case, *Moe*:

> "Allotments in severalty were not made on the Navajo Reservation and the provisions of the General Allotment Act never applied to the Indians on that reservation." (App. 69.)

Judge Smith's characterization of the factual pattern is correct:

> "The Navajos live to themselves—largely apart from the non-Indian community." (App. 69.)

Not so with the Indian population on the Flat-

[1]This brief will be limited to a discussion of the type of tax in which the State of Washington has a direct interest, the cigarette tax.

[2]See Dept. of Commerce, *Federal and State Indian Reservations and Indian Trust Areas*, pp. 63-65 (G.P.O. 1974).

[3]*Ibid.*

head reservation, where Indians comprise only 19% of the total reservation population, and where approximately half of the land is owned in fee, by Indians and non-Indians, and the remaining half is held in trust for the Confederated Tribes (hereinafter "the Tribes") or its individual members. (App. 13.) The pattern on the Flathead reservation is one of geographic and economic integration, not isolation.

What was said of the Oklahoma Indians in *Oklahoma Tax Comm'n v. U.S.*, 319 U.S. 598 (1943), can also be said of the Indians on the Flathead reservation:

> ". . . [T]hey are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions [on such property]." (319 U.S. at 603.)[4]

In the light of these factual differences, we examine the legal parallels which the Tribes attempt to draw with *McClanahan*.

The language in Art. II of the Navajo Treaty of June 1, 1868, 15 Stat. 667, 668, is admittedly similar to that in Art. II of the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, 976, in that both treaties

[4]As noted in *Oklahoma Tax Comm'n v. United States* 319 U.S. at 603, note 5, the Oklahoma Indians have made progress toward restoring the tribal government under such laws as the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984. Likewise, the Tribes have attained a measure of tribal government since 1934, now having their own court system and programs for law and order and other services. (See App. 15, 16.) The progress made by the Oklahoma Indians toward restoring tribal government did not grant them tax exemptions by implication, nor should it do so for the Tribes in the case at bar.

set a reservation apart for the use of the tribes involved and provide that generally no non-Indian may reside therein without permission of the tribes. (Br. of Conf. Tribes, 18.)

While the vitality of this language can hardly be in doubt with respect to the Navajo reservation, the same cannot be said with respect to the Flathead reservation, where less than a fifth of the population is still Indian. And if the Tribes can be said to be invoking that treaty language now, they invoke it only for the non-Indian tax collector, not for the non-Indian neighbors who patronize their members' smoke shops.

The Tribes also note the parallel language in the Arizona Enabling Act of June 20, 1910, 36 Stat. 557, 568, 569-70 and in section 4 of the Montana (and Washington) Enabling Act of February 22, 1889, 25 Stat. 676, 677, which required the Montana constitution to

> "forever disclaim all right and title to . . . all lands lying within [the state] owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . . " (See Br. of Conf. Tribes, 19.)

Whatever may have been the purpose of the language in the Arizona Enabling Act, the purpose

of the language in the Montana Enabling Act is clear. It was intended to preserve federal control over lands allotted in severalty to the Indians in Montana under the General Allotment Act, Act of February 8, 1887, 24 Stat. 388, during the period in which the lands were still held in trust pursuant to section 5 of the Act but during which also the reservations would in effect have been dissolved and pursuant to section 6, ". . . the Indians themselves would have passed under the authority and control of the state." *Draper v. U.S.*, 164 U.S. 240 at 246. That this "authority and control of the state" referred to in *Draper* would include taxing jurisdiction is established by *Goudy v. Meath*, 203 U.S. 146 (1906). Thus, *Draper* conclusively shows that the disclaimer in the Montana Enabling Act contemplated a situation in which the Indians would be subject to state laws, including tax laws; the disclaimer was intended solely to preserve control of the land allotted under trust patent until the end of the trust period, even though during the trust period the Indian was subject to state laws.[5] See *Draper*, 164 U.S. 240 at 245, 246.[6]

Far from being an indication of congressional intent that Indians be immune from state laws, the

---

[5]Section 6 of the General Allotment Act was later amended to become operative only at the *end* of the trust period. Act of May 8, 1906, 34 Stat. 182, 25 USC 349.

[6]*Draper* also explains why the disclaimer language in the Montana Enabling Act is cast in terms of Indian land, without any distinction between on-reservation and off-reservation land. Section 4 of the General Allotment Act set up a procedure for off-reservation Indians to obtain off-reservation public land, under procedures paralleling those for on-reservation Indians.

language of the Montana Enabling Act is just the opposite.

Montana has not assumed jurisdiction over the tribal parties for taxation purposes pursuant to the Act of August 15, 1953, 67 Stat. 588 (Public Law 280.) (Br. of Conf. Tribes, 20, 21.) But that hardly ends the discussion, as the Tribes suggest it should. Even the non-existence of PL 280 did not preclude state taxation in *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943). Nor was Arizona's failure to assume state jurisdiction over the Navajo reservation under PL 280 viewed in *Williams v. Lee*, 358 U.S. 217 (1959), as automatically cutting off any state jurisdiction. The test applied by the Court was whether tribal sovereignty was infringed, not whether PL 280 was implemented.

PL 280, we submit, was an invitation to expand whatever jurisdiction a state had prior to its enactment, and it provided a device for clearing up the many vexing questions as to what the scope of that jurisdiction was. It was not a trap which deprived the states of that already existing jurisdiction if the invitation to expand it was declined, as the Tribes seem to suggest. (Br. of Conf. Tribes, 20, 21.) *McClanahan* should not be read as setting up such a trap.

Finally, the type of tax involved in the case at bar is completely different from the personal income tax involved in *McClanahan*. The Montana cigarette tax imposes solely a collection obligation on the seller,

and arises only when the Indian seller becomes an entrepreneur, dealing with the same public as his non-Indian competitor. *McClanahan* established the right of the reservation Indian to earn his livelihood on the reservation—at least of the Navajo type—free from interference by the state tax collector. It did not establish his right to compete with the non-Indian in sales to the general public with the overwhelming tax advantage which the Tribes are asserting here. The right established by *McClanahan* for the Navajos is part of a larger right which they have always asserted and exercised, the right to be a people apart, left alone from the non-Indian population. The right asserted by the Tribes, especially with respect to sales to non-Indians, is the right to be left alone only up to a point, i.e., the point at which the tax collector comes calling.

B. *Oklahoma Tax Comm'n v. United States, applied in the light of the principles of equal protection embodied in the Fifth Amendment, controls the merits of these appeals.*

We start with several obvious but important considerations. For we believe that the Tribes slide too easily over the underlying problems. (Br. of Conf. Tribes, 25-29.)

Although the issue of the Indians' tax immunity can be phrased verbally as one of lack of jurisdiction, as suggested by the Tribes, at bottom the asserted immunity is based upon race and constitutes

a racial discrimination or preference. If the Congress were to pass a statute stating that no state would have "jurisdiction" to impose any taxes upon persons of Japanese ancestry, it would be ignoring realities to suggest that the immunity does not constitute a racial discrimination or preference. Even if the immunity were limited to certain types of persons of Japanese ancestry, such as those who could trace their ancestry to United States citizens relocated from the West Coast during World War II, the discrimination would still be racial. This is not to suggest that the discrimination would be unconstitutional; other considerations must be taken into account before that conclusion can be reached. Here we wish to point out only that the Tribes' attempt to cast the issue of racial discrimination in terms of jurisdiction is an attempt to hide the obvious.[7]

Admittedly, the immunity asserted by the Tribes can arise only in a certain geographical area, i.e., the Flathead reservation; and in this sense it smacks of "jurisdiction." But persons of other races cannot assert that immunity even though they be in that same geographical area. Thus a racial factor is a necessary ingredient in the asserted immunity, in addition to the geographical factor.

[7]While we have no difficulty with the result in *Morton v. Mancari*, 417 U.S. 535 (1974), we would suggest that the Court's characterization of the BIA hiring preference for members of federally recognized tribes as "political" rather than "racial" is misplaced. 417 U.S. at 553, note 24. The preference is both. The Court implicitly recognizes this when it refers to the "obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations." 417 U.S. at 554. This difficulty would hardly disappear if the blanket exemption covered only members of federally recognized tribes.

Secondly, neither in the case at bar, nor in *McClanahan*, nor in *Oklahoma Tax Comm'n* did the claimed tax immunity rest upon any language of a treaty or federal statute clearly and expressly granting the immunity. (The land held exempt from the state inheritance tax in *Oklahoma Tax Comm'n* may be viewed as an exception to this general statement. See 319 U.S. 598 at 610.)

Thirdly, the approach taken in *McClanahan* and that taken in *Oklahoma Tax Comm'n* are radically different. In the latter case, the Court focused on the assimilation of the Oklahoma Indians into non-Indian society, emphasized the principle that tax burdens and governmental benefits should go hand in hand, and accordingly required an express statutory exemption as a requirement for the asserted immunity.

In *McClanahan*, in contrast, the Court focused on the concept of tribal sovereignty, as applied on the Navajo reservation, and against this "backdrop" (411 U.S. at 172) found an immunity implied in various treaty and statutory provisions which, for the most part, did not deal expressly with taxation.

The choice between these two approaches is critical in resolving the issues in the case at bar. The principles of equal protection embodied in the Fifth Amendment require choosing the approach taken in *Oklahoma Tax Comm'n.*

There are several factors which can justify a

racial discrimination or preference in favor of Indians; but none of those factors are present here.

One is the factor present in *Morton v. Mancari*, 417 U.S. 535 (1974), i.e., a reasonable relationship between the Indian preference and the goal of Indian self-determination. But there is hardly any such relationship here; what is at stake here is simply the right of Indians to compete unfairly with their non-Indian competitors. Further, a tax on the commercial activities of even the sovereign itself, such as a state, is not an impairment of that sovereignty. See *New York v. United States*, 326 U.S. 572 (1946).

Another factor would be a federal policy of preserving Indian trust property intact, as exemplified by a statutory exemption of Indian land from property taxation. *Board of County Comm'rs v. v. Seber*, 318 U.S. 705 (1943). No such policy is present here.

Another factor would be a policy of freeing from state tax burdens the operation of a federally funded economic assistance program for Indians, such as that involved in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). There is no such policy or program here.

Morton v. Mancari, supra, establishes that the unique relationship between the federal government and the Indians can justify preferences which cannot be justified for any other racial group. But it also cautions us that the principles of equal protec-

tion embodied in the Fifth Amendment place limits on those preferences. The preferences must be reasonably related to "Congress' unique obligation toward the Indians." 417 U.S. at 555.

The tax immunities asserted here do not have that reasonable relationship. Accordingly, the Congress has never expressly granted them, and this Court should not create them by implication.

II

THE COURT NEED NOT REACH THE QUESTION OF WHETHER JURISDICTION EXISTS WITH RESPECT TO THE INDIVIDUAL TRIBAL MEMBERS PURSUANT TO 28 U.S.C. 1343(3) and 42 U.S.C. 1983.

The case at bar was commenced by both the Confederated Tribes and individual members thereof. The District Court predicated jurisdiction as to the Tribes upon 28 U.S.C. 1362 and jurisdiction as to the individual members upon 28 U.S.C. 1343(3) and 42 U.S.C. 1983 (App. 6). In so ruling, the District Court focused its attention only on the question of whether 28 U.S.C. 1341 defeated this jurisdiction; it is likewise upon this same question that the parties have directed their arguments as to jurisdiction. (Br. of Conf. Tribes, 32-35, and Br. of Montana, 19-23.) We do not wish to add to those arguments, but instead wish to direct the Court's attention to a somewhat different jurisdictional question, i.e., the question of whether the District Court was correct in assuming that 28 U.S.C. 1343(3) and 42 U.S.C.

1983 conferred jurisdiction as to the individual members, completely apart from any consideration of 28 U.S.C. 1341.

A ruling on this question is not required in order to reach either the merits of the appeals or the question of the applicability of 28 U.S.C. 1341. For 28 U.S.C. 1362 certainly confers jurisdiction as to the Tribes, and puts both the merits and the applicability of 28 U.S.C. 1341 in issue.

Thus, a ruling on this issue should await another case. This Court and the lower federal courts have consistently held that 42 U.S.C. 1983 and its jurisdictional counterpart, 28 U.S.C. 1343(3), do not encompass actions to challenge state taxes. See cases cited in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) at 542, note 6.

After citing three cases decided with opinion by this Court and two recent affirmances, without opinion, this Court stated in note 6:

> "All of these cases involved constitutional challenges to the collection of state taxes. Congress has treated judicial interference with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly." (405 U.S. at 542.)

The Court then quoted the provisions of 28 U.S.C. 1341.

Is the Court suggesting by this reference that if 28 U.S.C. 1341 is not applicable to challenges to

state taxes by Indians, then the cases cited in note 6 are not applicable either?

This precise issue is presently pending before the Ninth Circuit in *Satiacum v. Kinnear*, No. 74-1121. This action is a civil rights action, brought under 42 U.S.C. 1983 by a Puyallup Indian for damages against state officials because they attempted to enforce the Washington cigarette tax against the plaintiff. The District Court dismissed, on the basis of failure to state a claim under the Civil Rights Act (42 U.S.C. 1983), but the Court of Appeals reversed. Although the issue was not discussed in the Court of Appeals decision (as yet unpublished), it was squarely presented by a petition for rehearing filed by the state officials. By order of October 23, 1975, the petition was held in abeyance pending a decision in the case at bar, apparently in view of the possibility it might decide the issue.

We submit that the issue is best decided either on review of the final decision of the Court of Appeals in *Satiacum* or in some other subsequent case. It has not been briefed in the case at bar—quite properly so—and its resolution is not necessary in order to reach the other important issues here presented.

DATED this 16th day of January, 1976.

Respectfully submitted,

SLADE GORTON
Attorney General
TIMOTHY R. MALONE
Assistant Attorney General